Nos. 17-1717 and 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS WALTER DELLINGER AND MARTIN S. LEDERMAN IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are scholars who for many years have taught and written on constitutional law, including the Religion Clauses of the First Amendment.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution to the preparation or submission of this brief. All parties have lodged letters granting blanket consent to the filing of *amicus curiae* briefs.

SUMMARY OF ARGUMENT

Nothing in this case requires the Court to resolve longstanding debates about the manageability or application of various doctrinal "tests" under the Establishment Clause, such as the *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), and the "endorsement" test, *see Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 33-37 (2004) (O'Connor, J., concurring in the judgment). Two fundamental Establishment Clause principles about which there is no serious debate suffice to explain why a government generally may not erect or maintain a stand-alone Latin cross on public property, even though those principles might not require a finding that the Bladensburg Peace Cross is unconstitutional.

First, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Second, the government may not purport to assess, or express a view regarding, distinctly sectarian questions that divide religions, including, in particular, "[t]he miracles of the New Testament [and] the Divinity of Christ." *United States v. Ballard*, 322 U.S. 78, 87 (1944); *accord Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

A government's erection and maintenance of a prominent Latin cross on public land will usually be a form of denominational discrimination, treating Christianity more favorably than other religions. Moreover, the cross represents, and inevitably conveys, the central claims of Christianity that Jesus was the son of God; that he died on the cross to redeem the sins of man; and that he was then resurrected—

and when used as a memorial or grave marker, the cross evokes the divine promise of eternal life for those who have accepted Christ. The Constitution forbids the state from expressing a view about such contested sectarian matters.

When a state uses such a cross as a memorial to a group of fallen soldiers that does not cure these Establishment Clause concerns—it exacerbates them, by conveying the message that the community values the sacrifices of its Christian war dead more than the sacrifices made by service-members of other faiths. And to the extent the state asserts that such a memorial represents *all* fallen soldiers, or the community at large, that only makes matters worse, because it involves a form of prohibited religious coercion: To commemorate soldiers of a multitude of faiths with a sectarian symbol—especially one, such as the cross, that represents a promise of redemption to those who have accepted Christ and eternal damnation to those who have not—is to effectively compel nonbelievers to be associated with religious doctrines contrary to their own religious beliefs.

There are, however, certain discrete contexts in which a state's display of religious symbols, including a cross, might not violate any of these Establishment Clause prohibitions. In particular, a government may use a religious symbol on the headstone, or as the grave marker, of an individual soldier, corresponding to the deceased's religion, as the military regularly does. Whether viewed as the private speech of the fallen soldiers and their families themselves or as purely factual speech by the government concerning the religious affiliations of those veterans, the practice plainly does not implicate the Establishment

Clause concerns raised when the government uses a singular, contested sectarian symbol to commemorate or memorialize a collection of many individuals of disparate religions.

For that reason, the Bladensburg Peace Cross may pass constitutional muster by virtue of an idiosyncratic characteristic of that monument—namely, that it memorializes 49 former residents of Prince George's County who were, in all likelihood, all Christians. Prince George's County was almost exclusively Christian during the First World War, and there is no evidence in the record that any of the memorialized soldiers were not Christian; that any of their family members ever registered complaints about the Cross; or that state officials have ever been presented with evidence that non-Christians are among those whom the Cross memorializes. Absent any evidence to the contrary, then, it is fair to view the Peace Cross as, in effect, a collective version, or representation, of 49 "individualized" crosses, each corresponding to one Christian soldier. And as so understood, the Cross not as religious expression of the state itself, let alone governmental ratification of the messages of the cross, but instead as a respectful representation of a fact about the religion of those being honored—something the Establishment Clause generally does not prohibit.

The Court should, however, make clear that the state may not treat the Peace Cross as anything other than a memorial to such a similarly situated group of soldiers and that officials may not, for example, publicly declare that the Cross commemorates the religiously diverse array of county residents who have lost their lives serving in more recent wars.

ARGUMENT

I. TWO FOUNDATIONAL RELIGION CLAUSE PRINCIPLES ESTABLISH A STRONG, ALBEIT NOT ABSOLUTE, RULE THAT A GOVERNMENT MAY NOT ERECT OR MAINTAIN A LARGE LATIN CROSS ON PUBLIC LAND

Current and former Justices of this Court have sharply disagreed on a number of difficult questions regarding the meaning and application of the Religion Clauses of the First Amendment. Even if this Court's Establishment Clause jurisprudence might be "in need of clarity" in some respects, however, *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., respecting the denial of certiorari), the Court's decisions reflect a broad and enduring consensus on at least two foundational principles sufficient to resolve most cases involving a government's maintenance of a stand-alone Latin cross on public property.

First, "'[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)); *see also, e.g., Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race ... so too we strictly scrutinize governmental classifications based on religion.").

Second, the state may not endeavor to assess or purport to resolve the truth or falsity of claims of religious truth. *United States v. Ballard*, 322 U.S. 78, 87 (1944); *see also Smith*, 494 U.S. at 887. The framers of the First Amendment, the Court has explained, "fashioned a charter of government" in which "[m]an's relation to his God was made no concern of the state." *Ballard*, 322 U.S. at 87. Indeed, as Madison warned, the notion "that the Civil Magistrate is a competent Judge of Religious truth" is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 5 (1785), *reprinted in Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 67 (1947) (Appendix). It follows that governments may not establish or publicly express a view on distinctly sectarian questions that divide religions, including, in particular, "[t]he miracles of the New Testament [and] the Divinity of Christ." *Ballard*, 322 U.S. at 87. As Justice Scalia wrote,

> [O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has, with a few aberrations, . . . ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present . . . —where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

A government's erection and maintenance of a prominent Latin cross on public land will usually be unconstitutional because it violates both of these well-established Establishment Clause prohibitions.

First, "[t]he cross is of course the preeminent symbol of Christianity." *Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring). At a minimum, therefore, a state's maintenance of such a cross will typically constitute denominational discrimination, treating Christianity differently from and more favorably than other religions. And "[w]hatever else the Establishment Clause may mean[,] ... [it] means at the very least that government may not demonstrate a preference for one particular sect or creed (*including a preference for Christianity over other religions*)." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 605 (1989) (emphasis added).

Moreover, the cross "is an especially potent sectarian symbol," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring in part and concurring in the judgment), for it reflects and conveys a deeply contested view about one of the most significant questions dividing religious sects—"[t]he miracles of the New Testament [and] the Divinity of Christ." *Ballard*, 322 U.S. at 87. The cross represents the central theological claims that Jesus was the son of God; that he died on the cross to redeem the sins of man; and that he was then resurrected. Moreover, the principal reason most Christian denominations appropriate the cross—otherwise an instrument of torture and execution—as a central religious signifier, *particularly* when used as a memorial or grave marker, is that it evokes the

divine promise of eternal life for those who have accepted Christ: "For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life." John 3:16.

Thus, where a state takes the unusual and striking step of erecting or maintaining a permanent Latin cross on public land, it is reasonable to assume (at least absent some further evidence to the contrary) that the state is affirming these well-known, contested sectarian claims. Yet the Constitution forbids the state from endorsing, or denying, such inherently sectarian claims. Accordingly, even Justice Kennedy, who would have upheld the temporary display of a crèche in a courthouse in *County of Allegheny*, explained that "the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also, e.g.*, *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting) ("*All* of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history, and *all* the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ.").

For both of these reasons, it is generally unconstitutional for a government to erect or maintain a permanent Latin cross on public land.

II. ESTABLISHMENT CLAUSE CONCERNS ARE EXACERBATED, NOT DIMINISHED, WHEN THE STATE USES A CROSS TO COLLECTIVELY COMMEMORATE FALLEN SOLDIERS

The governmental petitioner here, the Maryland-National Capital Park and Planning Commission (M-NCPPC), argues that the Establishment Clause does not prohibit a state from using a Latin cross for one particular purpose: to "commemorate [the] valor and sacrifice" of soldiers who have died in the service of the nation. Pet. Br. 36.[2] Quoting Justice Kennedy's plurality opinion in *Buono*, petitioner contends that "when used in the context of a war memorial," a Latin cross is "'a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.'" *Id.* at 34-35 (quoting 559 U.S. at 721 (plurality)).

The fact that a state has chosen a cruciform war memorial in order to honor a group of fallen soldiers does not, however, cure the Establishment Clause concerns identified above; rather, it exacerbates them.

In such a case the state has made two distinct choices, not one: First, it has decided to erect or maintain a "collective" war memorial—something jurisdictions across the land do quite regularly. It has then also made a second, much more unusual choice—namely, to adopt a Latin cross as that memorial's form, its central (or sole) signifier. The government's

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[2] Except as otherwise noted, this and all further references to "Pet. Br." are to the brief of the M-NCPPC in No. 18-18.

general decision to erect a collective war memorial, of whatever form, is naturally understood as a means of commemorating soldiers' valor and sacrifice. That does not, however, establish any secular, let alone "predominantly secular" (Pet. Br. 20), basis for the far rarer decision of a government to choose a Latin cross as the particular *form* of such a "collective memorial"—a distinct choice that generates serious constitutional concerns.

After all, one of the Establishment Clause's original objectives was to prevent government from using or subsidizing religion to advance even the most laudable of secular objectives—in large measure so as to protect religion itself: To "employ Religion as an engine of Civil policy," Madison explained, is "an unhallowed perversion of the means of salvation." James Madison, *Memorial and Remonstrance* ¶ 5, *supra*, *reprinted in Everson*, 330 U.S. at 67.

What is more, there is no apparent secular reason why a government would ordinarily choose to use a sectarian symbol such as the Latin cross, signifying the sacrifice of Jesus—any more than it might use a different religious symbol, such as the Star of David or the Sword and Crescent—to memorialize the sacrifices of a religiously heterogeneous collection of its fallen constituents. The U.S. military lists well over 200 religious denominations or groups to which service-members belong,[3] and as of 2001 almost a

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[3] *See* Memorandum from Lernes J. Hebert, Acting Deputy Assistant Secretary, Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs, Re: *Faith and Belief Codes for Reporting Personnel Data of Service Members* (Mar. 27, 2017), https://bit.ly/2qk8vYu.

third of the armed forces were not Christian.[4] Presumably any appreciable group of soldiers who were residents of any contemporary jurisdiction—and particularly of any large county or state—would consist of individuals of many different religions, not all of them Christian, and of others who were not religious at all.

The choice of a cross for a collective commemoration of a group of a community's constituents would therefore (at best) convey the deeply insensitive message that the community values the sacrifices of its Christian war dead more than the sacrifices made by service-members of other faiths. It is thus hardly surprising that governments do not commonly use a stand-alone cross as a symbol to commemorate a large array of veterans, *see Trunk v. City of San Diego*, 629 F.3d 1099, 1111-16 (9th Cir. 2011) (surveying nationwide memorials)—especially not in recent decades, when the religious pluralism within the military has increased.

Petitioner M-NCPPC suggests (Pet. Br. 42) that a state might properly use a Latin cross for a war memorial as "a symbolic representation *of the community at large*" (emphasis added), and contends that there is a "longstanding tradition" (*id.* at 49) of using such a cross in government memorials and monuments to those members of a community who

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[4] *See* David R. Segal & Mady W. Segal, *America's Military Population*, Population Bulletin, Vol. 59, No. 4, at 25 (Dec. 2004) (Table 5), https://bit.ly/2AgOiKx.

have lost their lives in war.[5]

The Court should reject that argument and make clear that, even if the Bladensburg Peace Cross is constitutionally defensible because of its unusual characteristics, *see infra* Part III-B, it would be unconstitutional for the M-NCPPC or other Maryland institutions to present the Cross as "a symbolic representation *of the community at large*," or even as a commemoration of all residents of Prince George's County who have perished in all wars.

Such a holding would not have nearly the dramatic ramifications the M-NCPPC and some of its amici portend, because the history of using a cross for "collective" memorializations of a religiously mixed group of soldiers has been neither as ubiquitous nor as unequivocal as the M-NCPPC suggests. For one thing, most of the handful of state and local examples petitioner cites involved crosses erected before this Court held in 1947 that the Fourteenth Amendment "incorporated" the Establishment Clause to be applicable to the states. *See Everson*, 330 U.S. at 8, 14-15. Moreover, it appears that most of the crosses petitioner identifies honor a relatively discrete group of individuals who were probably all Christians. The Celtic cross erected at Gettysburg in 1888, for example, honors three New York regiments of the

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[5] *See also* J.A. 868 (local newspaper article quoting a Bladensburg Councilwoman as saying in 2001 that the Peace Cross "was built in memory of the World War I veterans, but now we believe it stands for the hope of peace and the sacrifices made from all wars").

Irish Brigade.[6] Similarly, the cross in Woonsocket, Rhode Island (*see* Pet. Br. 47) was dedicated to honor one local resident, William Jolicoeur, who perished in World War I and three brothers, the Gagnes, killed in World War II. Notably, the nine other memorials in Woonsocket to World War I soldiers reportedly are not in the form of a cross.[7] For reasons we discuss in Part III, *infra*, some or all of these rare crosses commemorating a homogenous group of soldiers might pass constitutional muster.[8]

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[6] *See* National Park Service, *Irish Brigade Monument at Gettysburg*, https://bit.ly/2T63ukG.

[7] *See* Steve Ahlquist, *Woonsocket Cross Built in 1952, Not 1921*, RIFuture.org (May 12, 2012), https://bit.ly/2V8weuJ.

[8] Some of petitioner's other examples (Pet. Br. 47), such as the Latin cross erected atop the "Jeannette Monument" in the Naval Academy Cemetery in 1890, honoring 18 sailors who died during an Arctic expedition, *see* United States Naval Academy: *Cemetery and Columbarium*, https://bit.ly/2PTkgBj, and the cross erected at Yorktown to commemorate the French soldiers who died there in the Revolutionary War, *see* National Park Service, *Yorktown Battlefield*, https://bit.ly/2BDQ3Bb, might be similarly explained, depending upon the particular persons memorialized there.

Yet other crosses cited by the M-NCPPC appear to be readily distinguishable on other grounds. The Celtic cross erected in Augusta, Georgia in 1901 (Pet. Br. 47), for example, marks the site where the St. Paul's Church was established within Fort Augusta in the Eighteenth Century. Apparently it stands on the property of St. Paul's Church itself, rather than on state-owned land. *See* John Lynn, *Your Hometown Stories: Fort Augusta* (Oct. 24, 2015), https://bit.ly/2LurYBm.

[continued ...]

The actions of the federal government respecting the graves of soldiers who died in Europe in the First World War offer a striking, and more representative, corrective to petitioner's historical account. To be sure, the military buried most of those soldiers beneath a cross. But when it knew that particular soldiers were Jewish, as approximately 1600 were, the military instead used a Star of David.[9]

Petitioner recounts (Pet. Br. 6) that when the government proposed to replace the temporary grave markers in Europe with permanent headstones, veterans groups and members of Congress advocated crafting them in the shapes of the "wooden symbols" ubiquitous across Europe, which had "during and since the World War, been regarded as emblematic of

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At least two of petitioner's examples (Pet. Br. 47-48) might be more problematic—or at least they would be if a government erected those crosses today and if the commemorated persons were religiously diverse. The 142nd Pennsylvania Brigade Monument, just west of Gettysburg (Pet. Br. 46), *see The Battle of Gettysburg: 142nd Pennsylvania Volunteer Infantry Regiment*, https://bit.ly/2GyKAkX, is dedicated to an entire regiment of at least 80 soldiers (only one of whom, Captain C.H. Flagg, died at Gettysburg, *see id.*, *Numbers 59. Report of Lieutenant Colonel Alfred B. McCalmont, 142nd Pennsylvania Infantry* (July 4, 1863), https://bit.ly/2Bw3bZ4). And the small Latin cross in Edmund Lyon park in East Rochester, New York, commemorates residents who died in four of the wars of the Twentieth Century up through the Vietnam War. *See* National War Memorial Registry, *East Rochester's Forever Young Memorial Plaque*, https://bit.ly/2LypS3w.

[9] *See Durable Markers in the Form of Crosses for Graves of American Soldiers in Europe: Hearings before the Committee on Military Affairs, House of Representatives*, 68th Cong., 1st Sess. 1, 3 (1924).

the great sacrifices which that war entailed, have been so treated by poets and artists and have become peculiarly and inseparably associated in the thought of surviving relatives and comrades and of the Nation with these World War Graves."[10] Not surprisingly, those "emblem[s]" were predominantly crosses, because the vast majority of fallen soldiers were Christian. That ubiquity accounts for the strong association, in memory, literature and art, between the cruciform grave-markers and WWI.

But not all of those who died on the fields of Europe believed in Christ—the "rows upon rows" of crosses were interspersed with Stars of David. Accordingly, the 1924 congressional resolution urged that the new durable markers should retain the designs of the existing wooden markers—*including* the Stars of David for the graves of Jewish soldiers,[11] a practice the War Department, per General Pershing, had already decreed.[12]

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[10] *See id.* at 1 (quoting H.R. Res. 16, 68th Cong. (1924)).

[11] *See id.*

[12] *Id.* at 5-6 (statement of Rep. Celler). A "war memorials committee" convened by the Secretary of War—with representatives from the War and Navy Departments, seven wartime organizations, and Catholic, Protestant and Jewish organizations—unanimously supported this practice of differentiating religious markers depending on the faith of the fallen, *see id.* at 18 (letter from John J. Burke, Chairman of the National Catholic War Council Committee on Special War Activities), as did the Veterans of Foreign Wars, *see id.* at 10 (statement of Lloyd M. Brett) ("[w]e have no objection . . . at all" to the use of the Stars of David [12] and, notably, the American Legion, *see id.* at 9 (resolution of the Legion's Executive Committee).

This inclusive practice honored a "fundamental principle" that allowed "the parents of these soldier boys a chance to put something there which is consistent with their religious belief." [13] The Executive Director of the Jewish Welfare Board testified that "the parents of these [Jewish] dead were deeply moved that this great Government, which seems so far removed to the average citizen, had a direct interest in their religious beliefs, which, traditionally, constitute the most significant element in the life of the Jew."[14]

Unfortunately, Congress has deviated from this historical norm more recently. As the M-NCPPC notes (Pet. Br. 49), twice in recent years Congress has designated free-standing Latin crosses on federal land as national war veterans' memorials to *all* of the veterans of one or more wars. *See* Department of Defense Appropriations Act, 2002, Pub. L. 107-17, § 8137(a), 115 Stat. 2278 (2002) (designating a white cross in the Mojave National Preserve as a memorial commemorating U.S. participation in WWI and honoring veterans of that war); Consolidated Appropriations Act, 2004, Pub. L. 108-447, div. J, tit. I, § 116(a), 118 Stat. 3346 (2004) (designating a cross in Soledad National Park as a national memorial

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[13] *Id.* at 6-7 (statement of Rep. Celler).

[14] *Id.* at 18 (statement of H.L. Glucksman). Unfortunately, the 1924 debate does not reflect any recognition that some of the fallen soldiers, albeit perhaps very few, might have been neither Christian nor Jewish. The important point for present purposes, however, is that there was an unequivocal consensus that no individual should be buried beneath a religious symbol that did not represent his faith, unless perhaps his family acceded.

honoring all military veterans); *see also* Pub. L. No. 109-272, § 2(a), 120 Stat. 770-71 (2006) (taking title and possession of the Soledad cross).

Whether or not it might have been constitutional for the government to retain possession of one or both of those two crosses,[15] Congress acted in a manner inconsistent with the Establishment Clause's central concerns when it chose to formally designate the crosses as memorials to *all* U.S. veterans of one or more wars. After all, many of those veterans were not Christian (or belonged to Christian denominations that do not share the standard Christian view of the cross), and the use of a Latin cross to commemorate them is therefore just as disrespectful as it would have been had the United States insisted on marking Jewish soldiers' graves with a cruciform during and after World War I—something that all concerned parties at the time understandably opposed, *see supra* at 13-15. Moreover, those non-Christian soldiers presumably held beliefs incompatible with the central sectarian message the cross conveys in connection with death and burial—that the deceased might enjoy eternal salvation for having accepted Christ as savior, *see* John 3:16.

This problem becomes even more acute, and more disturbing, when one considers the converse message inextricably linked to the cross's promise of salvation: namely, that those who do *not* accept the "preaching

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[15] Notably, in both of those cases the federal government eventually sold the property to private parties in order to resolve substantial constitutional challenges. *See Buono*, 559 U.S. at 709-710 (opinion of Kennedy, J.) (Mojave Cross); Greg Moran, *Soledad Cross Case Concludes, Leaving Memorial in Place*, San Diego Union-Tribune, Sept. 8, 2016 (Mt. Soledad Cross).

of the cross," 1 Corinthians 1:18, will be eternally condemned. *See id.* ("For the preaching of the cross is to them that perish foolishness; but unto us which are saved it is the power of God."); John 3:36 ("[H]e that believeth not the Son shall not see life; but the wrath of God abideth on him."); Mark 16:16 ("[H]e that believeth not shall be damned.").

To acknowledge these common messages of the cross—the promise and the threat—is not to disparage them but to take them seriously, as matters "of profound belief and deep meaning, subscribed to by many, denied by some." *Town of Greece v. Galloway*, 572 U.S. 565, 635-636 (2014) (Kagan, J., dissenting). Yet that is all the more reason it would be untenable to insist that a Latin cross could fairly be understood as a neutral recognition or valorization of veterans of all faiths, or that such a cross does not express a view on a deeply contested sectarian question that fundamentally divides religions and

many of the commemorated soldiers.[16]

Indeed, the state's use of a cross to commemorate or valorize soldiers of all faiths also violates the constitutional injunction against religious coercion. Petitioner American Legion is mistaken when it insists (Pet. Br. in No. 17-1717 at 23) that religious coercion—compelled religious belief, practice, or financial support—is, or should be, the *exclusive*

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[16] In *Town of Greece*, the Court upheld a municipality's practice of inviting local clergy to offer prayers before city council meetings, even though some of the invited ministers had occasionally referred to "the saving sacrifice of Jesus Christ on the cross" and "the life and death, resurrection and ascension of the Savior Jesus Christ." In that case, however, the Court effectively treated the content of the varying prayers as private expression, in a sort of "quasi-public forum" for local clergy who were invited from all of the congregations located within the town's borders, rather than as government expression. *See* 572 U.S. at 582 ("Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."); *see also id.* at 581 (warning of the risk of legislatures that sponsor prayers acting "as supervisors and censors of religious speech" if they try to exclude certain content).

touchstone of an Establishment Clause violation.[17] Nevertheless, it is certainly an important function of the Religion Clauses, as this Court's cases attest. *See, e.g.*, *Lee*, 505 U.S. at 592-594; *Torcaso v. Watkins*, 367 U.S. 488 (1961) (declaring invalid a provision of the Maryland Constitution requiring public officials to declare a "belief in the existence of God"); *Smith*, 494 U.S. at 877 ("The government may not compel affirmation of religious belief."). The framers, familiar with the terrible history of forced conversions

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[17] This Court long ago held that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). The Clause also imposes several other prohibitions, including the two most germane to this case—the proscription on denominational discrimination and the disability of the state from assessing and endorsing (or disparaging) the truth or falsity of fundamentally sectarian religious questions that divide observers of various religions—and "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion by a civil magistrate,'" *id.* at 431-432 (quoting paragraph 5 of Madison's *Memorial and Remonstrance*). To accept the American Legion's view that coercion is a necessary, rather than merely a sufficient, basis for an Establishment Clause violation would require repudiating decades of the Court's jurisprudence and the consensus understandings of numerous Justices who have otherwise profoundly disagreed about various Establishment Clause questions. In addition to the views of Justices Scalia and Kennedy quoted earlier, *see supra* at 6 (quoting Justice Scalia in *Lee*) and 8 (noting Justice Kennedy's observation in *County of Allegheny* that placing a (non-coercive) cross atop city hall would be unconstitutional), see, e.g., *Van Orden v. Perry*, 545 U.S. 677, 733 n.35 (2005) (Stevens, J., dissenting).

in Europe, crafted both the religion clauses of the First Amendment and the Religious Test Ban of Article VI, Section 3 to prevent the prospect of compelled religious conformity.

A government transgresses this fundamental norm when it chooses to commemorate or memorialize soldiers of a multitude of faiths and beliefs with a sectarian symbol associated with one particular religion—especially one, such as the cross, that represents a doctrine promising redemption only to those who conform to the majoritarian religious orthodoxy, and threatening eternal damnation to those who believe otherwise. In such a case, the non-Christian soldiers (and perhaps even some of the Christian soldiers who do not believe the message of the cross) are, in effect, being posthumously impressed into an association with a religion, and with a deeply contested set of religious doctrines, contrary to their own religious associations, commitments and beliefs (or their agnosticism). *Cf. Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that a state may not compel an organization to include in its parade individuals who would march under banners that would convey messages the organization wished not to convey).

Few would dispute that if the state placed a cross on the grave of every soldier who died in service, it would effectively desecrate the burial place of those who are nonbelievers. The harm occasioned by such "[a] state-created orthodoxy," *Lee*, 505 U.S. at 592, is hardly lessened if the nonbelievers are, instead, commemorated by a "collective" cross.

For all of these reasons, it was unconstitutional for

Congress to designate two Latin crosses as national memorials honoring all veterans, *see supra* at 15-16, just as it would be for the federal government to construct such a cross as "an official World War I memorial on the National Mall," *Buono*, 559 U.S. 728 (Alito, J., concurring in part and concurring in the judgment).

Likewise Maryland, or one of its subdivisions such as the petitioner here, would transgress the two central Establishment Clause principles we discuss in Part I, as well as the core prohibition on compelled religious association, if it were now to begin treating the Bladensburg Peace Cross as "a symbolic representation of the community at large" (Pet. Br. 42), or as a commemoration of the religiously diverse array of Prince George's County residents who have lost their lives serving the nation in the wars of recent decades.

For reasons we explain in the next Part, however, that does not mean that the state's present-day retention of the Bladensburg Peace Cross is necessarily invalid, in light of the unusual circumstances in which that memorial was constructed and the discrete group of soldiers to whom it is dedicated.

III. BECAUSE OF ITS APPARENTLY UNUSUAL CHARACTERISTICS, THE BLADENSBURG PEACE CROSS MAY BE CONSTITUTIONAL

A. In Certain Limited Contexts the Constitution Does Not Bar a Government from Displaying Religious Symbols, Including a Cross.

Petitioner is correct (Pet. Br. 25) that the Establishment Clause does not *categorically* prohibit government displays and monuments that employ religious symbolism. There are, in fact, at least three contexts in which the use or display of such religious symbolism might not implicate either the prohibition on denominational discrimination or the prohibition on government assessment of, or expression of a view regarding, contested questions of religious truth, and in which the state does not impermissibly compel religious affiliation of nonbelievers.

First, as this Court held in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), a government may permit the display of an unattended Latin cross on state grounds if that religious expression is "purely private and ... occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id.* at 770

(plurality opinion).[18]

Second, in at least in some circumstances the state may present religious expression of historical or artistic significance, as long as the state does so in order to advance secular ends and does not endorse or favor particular denominations or take positions on the truth or falsity of contested religious questions. For example, a public school may assign readings from the Bible in order to study "its literary and historic qualities," "presented objectively as part of a secular program of education." *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963); and a government-run museum may include religious iconography in art—including depictions of the cross—because of its importance in the history of art or its aesthetic virtues. Likewise, in some settings the state may include religious symbols or religious figures of historic or literary significance as part of a broader tableau presented for secular reasons—such as the inclusion in this Court's courtroom frieze of the figure of Moses holding the tablets containing the Ten Commandments, "in the company of 17 other lawgivers, most of them secular figures, [such that] there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion." *McCreary County v*

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[18] Three of the seven Justices in the *Pinette* majority further opined that in certain circumstances the state may be required to take affirmative steps to clarify for a "reasonable, informed observer" that the speech is private and to disclaim the state's endorsement of it. *See id.* at 773, 776 (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment); *id.* at 784, 794 & n.1 (Souter, joined by O'Connor and Breyer, JJ., concurring in part and concurring in the judgment).

American Civil Liberties Union, 545 U.S. 844, 874 (2005).[19]

It may even be the case that a state may erect a cross, or include a cross in a broader display, in order to depict an event involving Christians that is of historical significance distinct from its religious importance (again, so long as the state does not endorse Christianity or adopt any views on its precepts). For example, the Cape Henry Memorial Cross, in the Colonial National Historic Park in Yorktown, Virginia, bears a prominent plaque explaining that it commemorates the 1607 landing of the first permanent English settlers in the new

[19] Even in such a case involving scriptural depictions, the state may not express a view on whether or not the biblical account is true. For example, where a state may teach that "*[a]ccording to Judeo-Christian belief*, the Ten Commandments were given to Moses by God on Mt. Sinai," *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (emphasis added), it may not take a position on the validity of that belief. Likewise, although this Court held that the City of Pawtucket could include a crèche in the city's annual shopping district Christmas display, alongside a Santa Claus house, a Christmas tree, and a "Season's Greetings" banner, because that crèche "depicts the historical origins of this traditional event long recognized as a National Holiday," *Lynch v Donnelly*, 465 U.S. 668, 680-681 (1984), it surely would be unconstitutional for a government to express a view on whether the virgin birth depicted by the crèche actually occurred.

world.[20]

Third—and of greatest significance to this case—no one doubts that a government may use a religious symbol on the headstone, or as the grave marker, of an individual soldier, corresponding to the deceased's religion, just as the military did in the European cemeteries after World War I, *see supra* at 13-15, and just as the military does in the Arlington National Cemetery, where it allows the families of fallen service-members to choose from among at least 70 different "authorized emblems" for their headstones, including the Bahai Nine-pointed Star, the Buddhist Wheel of Righteousness, the Christian Science Cross and Crown, the Jewish Star of David, the Muslim Star and Crescent, the Unitarian Flaming Chalice, the Wiccan Pentacle, and several different versions of a cross.[21] Whether viewed as the private speech of the fallen soldiers and their families themselves or, alternatively, as purely factual speech by the government concerning the religious affiliations of

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[20] *See* National Park Service, *Cape Henry Memorial*, https://bit.ly/2CaXooK. Another such example is a plain wooden cross included within a display depicting a pioneer family, erected in 1976 on a public plaza in Victoria, Kansas—a tribute to the first twenty-three families of Volga-Germans who arrived in Victoria in 1876 and established the village of Herzog. *See* Waymarking.com, *Pioneer Family Village Cross—Victoria, Kansas*, https://bit.ly/2SfnyRo. Similarly, one of several monuments in Emmet Park in Savannah, Georgia, is a Celtic cross, made of Irish limestone from the County of Roscommon, honoring Savannahians of Irish descent. *See* Visit-Historic-Savannah.com, *Emmet Park Monuments*, https://bit.ly/2BzwDgY.

[21] *See* U.S. Veterans Administration, Form 40-1330: General Information Sheet; Claim for Standard Government Headstone or Marker, https://bit.ly/2QNrfRu.

those veterans, the practice plainly does not implicate the Establishment Clause concerns that are raised when the government uses a singular, contested sectarian symbol to commemorate or memorialize a collection of many individuals of disparate religions.

B. The Bladensburg Peace Cross May Be Constitutional In Light of the Common Religion of the Soldiers to Whom it is Dedicated.

This is not a case, like *Pinette*, involving "purely private" religious expression in a true public forum. To be sure, private parties designed the Peace Cross and raised funds for its creation. But State governmental entities were responsible for the erection of the Cross in the first instance as a "fitting tribute to those of our boys who gave their lives in the World War,"[22] and have owned and maintained the

[22] In 1922, the Commissioners of the Town of Bladensburg "request[ed] and authorize[d]" the Snyder-Farmer Post of the American Legion to "complete the Cross and its surroundings" on then-city-owned land, J.A. 64, and in that same Resolution purported to "assign and grant" to that American Legion Post the parcel of ground on which the Cross stands, with a reservation that the plot and the cross would "revert" to the Town of Bladensburg if the Legion post were ever to go out of existence, *id.* at 65.

Cross for at least 58 years, if not longer.[23] Therefore, at all times since its erection the Peace Cross has been *either* "expression by the government itself, or else government action [that has] discriminate[d] in favor of private religious expression," *Pinette*, 515 U.S. at 764 (plurality opinion) (emphasis omitted)—i.e., a case of "governmental *favoritism*" of religious expression, *id.* at 766, that triggers rigorous scrutiny under the Establishment Clause regardless of who may have owned the Cross at any particular time. *Accord County of Allegheny*, 492 U.S. at 600.

If the Cross were "a symbolic representation of the community at large" (Pet. Br. 42), or a commemoration of the religiously diverse array of Prince George's County residents who have lost their lives serving the nation in the wars of recent decades, it would almost surely not survive such scrutiny. It appears, however, that the Peace Cross is neither of those things, and that may make all the constitutional difference.

The Peace Cross dominates its landscape, just five miles northeast of this Court. Its apex rises almost 40 feet off the ground; and it is dramatically illuminated at night. Today, after many years of

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[23] In 1935, the Maryland legislature authorized the State Roads Commission to acquire the land (if necessary) so that the State could manage "the traffic hazard situation at this junction." J.A. 420-421. The Commission acquired the property no later than 1956, apparently following some uncertainty about its legal status, *see* J.A. 1376-1379, and conveyed the property in 1960 to the petitioner M-NCPPC, a bi-county agency empowered by the State of Maryland to, *inter alia*, provide land use planning for the physical development of Prince George's and Montgomery counties, *see* J.A. 1380, 1382.

highway development surrounding it, the Cross sits on a grassy, crescent-shaped traffic island at the intersection of two very busy thoroughfares, U.S. Route 1 (Baltimore Avenue) and Maryland Route 450 (Bladensburg Road).

The monument—a Latin cross (although it has small, semicircular brackets at the top and bottom of each arm that are characteristic of a Celtic cross)—was designed to bring to mind the cross at Calvary,[24] and so it does, as reflected in the keynote speech by U.S. Representative Stephen Gambrill at the 1924 dedication ceremony: "You men of Prince Georges county fought for the sacred right of all to live in peace and security and by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause."[25]

The specific purpose for building the Cross was to honor and memorialize a discrete, fairly small number of soldiers—49 residents of Prince George's County. The plaque at the foot of the Cross reads: "This Memorial Cross is dedicated to the heroes of Prince George's County, Maryland, who lost their lives in the Great War for the liberty of the world," and it inscribes the names of the 49 men.[26]

If a government were to build this same Cross today, to honor dozens or hundreds or thousands of veterans from a particular county or state who had died while serving in the armed forces, it would almost certainly be unconstitutional, for the reasons

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[24] J.A. 428, 431, 433.

[25] J.A. 441-442.

[26] *See* J.A. 145 (Figure A).

we explained in Part II. Indeed, even apart from any constitutional considerations, very few government officials today would propose using a huge Latin cross to commemorate a substantial cross-section of their constituents, because to do so would, at a minimum, be deeply insensitive to the non-Christian honorees and their families. It is noteworthy, in this respect, and not at all surprising, that every time Maryland authorities have added another memorial or monument in the vicinity of the Peace Cross in recent years, *see* Pet. Br. 12, they have *not* used a cross or other religious symbol to memorialize the dead.

Yet as far as the record of this case reflects, there does not appear to have been any hint of such concerns, or of any constitutional doubts, in the many years of extensive public planning and fundraising for the Peace Cross.

What explains this stark difference in treatment?

For one thing, the Maryland Constitution does not prohibit religious establishments, and it was not until this Court's decision in *Everson*, in 1947, *see* 330 U.S. at 8, 14-15, that the States understood themselves to be bound by the Establishment Clause as "incorporated" through the Fourteenth Amendment. Perhaps, then, state and local officials did not have constitutional considerations in mind when they approved and maintained the Peace Cross. In and of itself, of course, that would not immunize the Cross from constitutional scrutiny. *See, e.g., Torcaso* (declaring invalid a provision of the Maryland Constitution requiring a religious test for state office). It might, however, begin to explain why no one in the 1920's appears to have given any thought to the constitutional question.

Even so, why weren't Maryland officials at least as concerned as contemporaneous members of Congress, *see supra* at 13-15, about the palpable *impropriety* of using a cross to memorialize non-Christians?

It is impossible to know for certain, but the answer is likely that the 49 Prince George's County residents commemorated by the Peace Cross were all Christian—or, at the very least, the private and governmental sponsors of the Peace Cross had no reason to think otherwise.

As of 1916, at least 600,000 residents of Maryland (out of a population of approximately 1.36 million) were members of a church or other religious congregation.[27] Of these, over 95% belonged to a Christian denomination. Jewish synagogues and other congregations had only 12,056 members (approximately two percent of the state total),[28] and there appear to have been well under 1000 members of other non-Christian denominations or Christian denominations that might not share the predominant understanding of the cross's meaning and use.[29]

Of greater significance for purposes of the Peace Cross, the Census Bureau found that as of 1916, at

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[27] *See* U.S. Department of Commerce, Bureau of the Census, *Religious Bodies, 1916*, Part I, at 103-104 (1919) (Table 36); *see also id.* at 139 (Table 58) (noting more than 87,000 members of all-Negro churches).

[28] *See id.* at 110 (Table 38).

[29] *Id.* at 181-182 (Table 62—Maryland). For example, the Census Bureau counted 77 members of Spiritualist congregations and 263 members of Latter-Day Saints congregations in Maryland, *id.* at 182.

least 15,598 of the 36,147 residents of Prince George's County belonged to a church or other religious congregation, and yet recorded *none* of those as belonging to a non-Christian denomination.[30] Of the 12,056 or so Jews reported in Maryland, 11,775 belonged to Baltimore congregations, and the Census Bureau recorded no Jews at all in Prince George's County.[31]

All of which is to say that the population of Prince George's County was overwhelmingly—almost exclusively—Christian during the First World War. It is therefore unsurprising that the voluminous record in this case contains no evidence that any of the 49 memorialized soldiers were not Christian; that any family members of the 49 registered complaints with the planners and builders of the Peace Cross (or with the government officials who approved and facilitated it) that the Cross would not be representative of their loved ones to whom the Cross was dedicated; or that state officials have ever been

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[30] *See id.* at 271-272 (Table 63—Maryland). The Census Bureau listed 176 persons in Prince George's County under a catch-all "All Other Bodies" heading, but they did not belong to a Jewish congregation and there is no indication how many of them were not Christian.

[31] *Id.* at 271 (Table 63—Maryland). To be sure, the Census Bureau did not make any findings with respect to the religious beliefs of the 20,000 or so Prince George's County residents who were not affiliated with a congregation, some of whom, of course, might not have considered themselves Christians. Although it is unknown how many of them would have rejected the use of a cross in their memory, it is probably fair to extrapolate from the Census Bureau's figures concerning religiously affiliated residents of the county that the number was very low.

presented with evidence that non-Christians are among those whom the Cross memorializes.[32]

Assuming that those responsible for approving, building and maintaining the Peace Cross have had no reason to believe that any of the 49 fallen Prince George's residents were not Christian, it would be fair to characterize the Peace Cross as analogous to other memorials to groups of soldiers who were uniformly of a single religion. *See supra* at 12-13 & note 8. Imagine, for instance, that the state and local officials responsible for the Bladensburg memorial had erected a field of 49 crosses, each corresponding to one Christian soldier—thus truly mirroring the fields of crosses in Europe. If that memorial would have been constitutionally sound, then so, too, might be the Peace Cross, at least to the extent it is fair to view that monument as, in effect, a collective version, or representation, of those 49 "individualized" crosses.

In the absence of any further, contrary evidence of the soldiers' religion or state officials' understandings about those soldiers' religious affiliations, then this would appear to be the rare case, akin to the Celtic

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[32] Although reporters for a recent *Washington Post* story were unable to determine the religious affiliations of all 49 soldiers, they did find that six of them are buried at Arlington with gravestones marked by a cross and that "[o]thers are buried in small Episcopalian or Catholic cemeteries primarily in Maryland." Ann E. Marimow & Michael E. Ruane, *A World War I Cross Under Siege*, Washington Post (Sept. 21, 2018), https://wapo.st/2PRTSYC. They did not identify any non-Christian soldier among the 49. The American Jewish Committee in New York contacted the relatives of one soldier, Maurice Snyder, in 1921, thinking that perhaps he was Jewish, but Snyder's father informed the AJC that the family was not Jewish. *Id.*

cross at Gettysburg honoring regiments of the Irish Brigade, *see supra* at 12, in which the Establishment Clause does not forbid the state's maintenance of a "collective" war memorial in the form of a Latin cross for a group of Christian soldiers (at least insofar as their families do not object). On this record, it would appear to be reasonable to view the Peace Cross not as religious expression of the state itself, let alone governmental ratification of the messages of the cross, but instead as a respectful representation of a fact about the religion of those being honored—and thus would not appear to implicate the Establishment Clause proscriptions we have identified.

The Court should make clear, however, that the state is constitutionally forbidden from treating the Peace Cross as anything other than a memorial to such a similarly situated group of soldiers and that Maryland officials may not, for example, publicly declare that the Cross represents "the community at large" (Pet. Br. 42) or that it memorializes the religiously diverse array of county residents who have lost their lives serving in more recent wars[33]—

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[33] In contrast to the Peace Cross, the Wayside Cross in Towson, Maryland was dedicated in 1921 to the commemoration of the citizens of Baltimore County who died in the war. J.A. 1453-1457. As noted above, 12,000 or so Jews lived or worshiped in Baltimore during the war. If any of them were among those commemorated by the Wayside Cross, that would certainly raise a more serious constitutional concern, unless perhaps their family members assented to the representation.

[continued ...]

soldiers who are appropriately commemorated by *nonreligious* monuments the State has subsequently erected in the vicinity of the Peace Cross.[34]

The American Legion also refers to the "Victory Cross" in Baltimore (Pet. Br. in No. 17-1717 at 5), which is "Dedicated to the glory of God and in reverent memory of the men and women of this community who served their county in all wars." *See* Waymarking.com, *Non-Secular Stone Cross Memorial—Baltimore, MD*, https://bit.ly/2EL24Zp. It is not clear whether that cross is on public land, is owned by the state, or if Maryland is otherwise responsible for it. If the State is responsible, however, then that cross would appear to raise the serious constitutional concerns discussed in Part II, *supra*.

[34] Although it would certainly behoove the M-NCPPC to replace the current, worn Peace Cross plaque with one specifying that the 49 men were (or are believed to have been) Christian, the Establishment Clause probably does not require the State to undertake any such "affirmative obligations," *Pinette*, 515 U.S. at 777 (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment), at least so long as state and local officials do nothing to deny or obscure the basis for the conclusion that the Cross is a constitutionally permissive anomaly. Unlike the cross in *Pinette*, the Peace Cross is not in front of a prominent government building; it sits in a traffic island surrounded by fast-moving vehicles. A "reasonable, informed observer," *id.* at 773, therefore might have assumed, before the notoriety of this constitutional challenge, that the Cross and/or the land was privately owned, precisely because it is not the sort of thing one ordinarily sees on public property. Nor is there any parking nearby, or any crosswalk to allow curious pedestrians to approach the Cross and read its plaque. At least for the foreseeable future, then, most of what the public will know about the Peace Cross is what it learns from whatever this Court writes about it. And even years from now, individuals troubled about the Cross would be able to readily ascertain the ground on which this Court concluded it was not constitutionally infirm.

CONCLUSION

In the absence of any further evidence that might call into question the idiosyncratic characteristics of the Peace Cross we have described, including the apparently common religious affiliations of the soldiers whom the Cross commemorates, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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